80-537

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

IN RE: J.W.B., J.G.B., AND K.L.B.

ON APPEAL FROM THE
TEXAS COURT OF CIVIL APPEALS
11TH SUPREME JUDICIAL DISTRICT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

I.

Whether the Texas termination statute (Section 15.02, Texas Family Code), which permits the state to terminate a parent's parental rights on the basis of certain parental behavior and of the "best interest of the child", is unconstitutionally vague and indefinite on its face and invalid as applied to Appellant.

II.

Whether Appellant was deprived of her due process right to fair trial and was subjected to double jeopardy in a quasi-criminal procedding, because

(1) the state, ignoring the res judicata doctrine, brought an identical termination suit for the second time immediately after Appellant was exonerated at the first trial,
(2) the state was malicious and vengeful in prosecuting the said second termination suit, in that there was no compelling state interest to justify invasion of Appellant's family integrity,
(3) the state committed cumulative procedural error at the trial which resulted in unfairly prejudicial and harmful jury findings, and
(4) the state-appointed attorney ad litem was incompetent and delinquent in the representation of the children's interests.

LIST OF PARTIES

Appellant: Kay Boggs Morris, natural mother of the children, J.W.B., J.G.B., K.L.B.
Appellee: Taylor County Child Welfare Unit, Texas Department of Human Resources

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO.

IN RE: J.W.B., J.G.B., AND K.L.B.

JURISDICTIONAL STATEMENT

Appellant Kay Boggs Morris, mother of the children involved in this cause, appeals from the judgment of the Texas Supreme Court entered on May 14, 1980, affirming the decision of the Texas Court of Civil Appeals, 11th Supreme Judicial District, which had affirmed a trial court judgment terminating Appellant's parental rights to her three minor children.

OPINIONS BELOW

The opinion of the Texas Court of Civil Appeals, 11th Supreme Judicial District, sitting at Eastland, Texas, dated October 18, 1979, appears in Cause No. 5314, styled In Re: J.W.B., J.G.B.,

and K.L.B., and is attached hereto as Appendix C, infra. This opinion has not yet been reported in the Reporter Systems.

The judgment of the 326th District Court in and for Taylor County, Texas, appointing Appellant as Managing Conservator, dated March 7, 1978, is attached as Appendix A. The judgment by the same trial court, terminating Appellant's parental rights, dated December 21, 1978, from which this appeal was taken, is attached as Appendix B.

The order of the Texas Supreme Court, denying Appellant's Application for Writ of Error, dated May 14, 1980, and its order overruling Motion for Rehearing dated July 23, 1980, are set forth in Appendix D and Appendix E, respectively, infra.

GROUNDS OF JURISDICTION

On October 19, 1977, Appellee, Taylor County Child Welfare Unit unsuccessfully brought suit to terminate Appellant's parental rights. The jury returned a

verdict in favor of Appellant and the trial court accordingly appointed Appellant Managing Conservator of her children.

On February 21, 1978, while the previous suit was still pending entry of the trial court's orders (No written judgment was entered until March 7, 1978), Appellee filed a second termination suit against Appellant with identical pleadings to those of the suit previously tried in which Appellant was appointed Managing Conservator.

At this second trial, the jury rendered verdict against Appellant, the result being termination of her parental rights.

Appellant's appeal to this court stems from her second trial. However, the first trial is important because it forms the basis of several issues which are a part of this jurisdictional statement.

First, Appellant was denied, over objections, her rights to assert, as pled, her affirmative defense to res judicata.

Appellant argues here, as in the state courts, that she was entitled to this defense, that she properly pled her defense, and preserved error by timely objection, when the trial court admitted testimony of events occurring prior to the previous trial. Appellant argues in this jurisdictional statement that failure of the Texas courts to allow a defense which is accorded to all other defendants in this state denied her due process and equal protection of the laws of the State of Texas, as well as her constitutionally mandated rights preserved by the United States Constitution and its Amendments thereto.

Second, Appellant challenged Section 15.02 and 15.02(2), Texas Family Code, used to terminate her parental rights as being so impermissibly vague, indefinite and overbroad as to violate her constitutionally protected rights to due process and equal protection of the law.

Appellant, in particular, vigorously challenged Section 15.02(2), Texas Family Code, which contains the "best interest of the child test".

Appellant's challenge attacks the unfettered discretion allowed judge and jury in the use of a term which is not statutorily defined, and as such, does not provide her notice of what the statute requires or does not require which would or would not be in the best interests of her children.

Third, based upon the legally admissible evidence adduced at the second trial of this cause, it is Appellant's contention that Appellee failed to establish the compelling state interest required to terminate her parental rights as required by Roe v. Wade, 410 U.S. 959, (1973); Wisconsin v. Yoder, 406 U.S. 205, (1972); Alsager v. District Court of Polk County, Iowa, 406 F.Supp. 10, (S.D. Iowa, 1975), and solely because of family illness and misfortune, seized and deprived her of her

fundamental rights to family integrity; In the Matter of REW, 545 SW2d 573(Tx. Civ. App. Houston (1st Dist.) 1976, writ ref'd n.r.e.).

Additionally, because no standard or definition of best interest existed, the ad litem attorney for Appellant's children subjectively determined not to object to legally inadmissible evidence which unlawfully denied Appellant's children of their rights to family integrity and due process of law, through the wrongful removal of the natural presumptions that exist in law that evidence to the contrary, the natural parent is entitled to possession of their children.

Nor did the children's attorney object to the possession by Appellee of said children in the absence of any court order, or question foster parent abuse of said children while said children were in the care and custody of Appellee.

Appellant asserts such conduct was caused by the subjective determination of said attorney that such conduct in representation of these children would not be in their best interests.

Until the court defines the term best interest and specify what conduct is required of the parties involved, including the ad litem attorney for said children, such unfettered discretion, sometimes not to the best interest of children, will continue to occur, thus effectively denying said children of Appellant as well as those in the State of Texas to their due process entitlement to a hearing when seized by the State, protection when abused by State foster parents, and a return to the home, in keeping with the sanctity and family integrity they are entitled to under constitutional mandate.

Appellant has asserted her constitutional remedies at the state trial court and appellate levels. These appeals

now being exhausted, Appellant invokes the jurisdiction of this Court under provisions of 28 U.S.C. §1257(2).

In the event this Court rejects Appellant's appeal under the provisions of 28 U.S.C. §1257(2), it is requested this Court treat the jurisdictional statement as a petition for writ of Certiorari under the authority of 28 U.S.C. §2103. Gomez v. Perez, 409 U.S. 535, 537, n.2 (1973); Miskin v. New York, 383 U.S. 502, 512 (1966).

STATUTES INVOLVED

The applicable statute involved in this appeal is Section 15.02, Texas Family Code, hereinafter referred to as the Texas termination statute. The statute is set out in its entirety in Appendix G, infra.

QUESTIONS PRESENTED

I

Whether the Texas termination statute (Section 15.02, Texas Family Code), which permits the state to terminate a parent's parental rights on the basis of certain behavior and of the "best interest of the child", is unconstitutionally vague and indefinite on its face and invalid as applied to Appellant.

II

Whether Appellant was deprived of her due process right to fair trial and was subjected to double jeopardy in a quasi-criminal proceeding, because

(1) the state, ignoring the res judicata doctrine, brought an identical termination suit for the second time immediately after Appellant was exonerated at the first trial,

(2) the state was malicious and vengeful in prosecuting the said second termination suit, in that there was no compelling state interest to justify invasion of Appellant's family integrity,

(3) the state committed cumulative procedural error at the trial which resulted in unfairly prejudicial and harmful jury findings, and

(4) the state-appointed attorney ad litem was incompetent and delinquent in the representation of the children's interests.

STATEMENT OF THE CASE

A brief chronological listing of the events in the case would be of help understanding the nature and character of the case.

(1) August 10, 1976

Appellee (the state through the Taylor County Child Welfare Unit) seized Appellant's two children by an ex parte court order.

(2) September 17, 1976

The trial court appointed the state as temporary managing conservator and maternal grandparents as temporary possessory conservators.

(3) August 15, 1977

The state seized Appellant's third child (born after the above court proceeding) and filed a suit seeking termination of Appellant's parental rights to all of the three children.

(4) October 19, 1977

At the termination trial, the jury returned a verdict in favor of Appellant. The trial court appointed Appellant as managing conservator and returned the children to Appellant.

(5) February 21, 1978

The state filed a second termination suit against Appellant on identical changes regarding the same three children.

(6) March 7, 1978

The court entered a written judgment based on the October 19, 1977 jury verdict, appointing Appellant as managing conservator.

(7) November 7, 1978

At the close of the trial on the second termination suit, the jury returned a verdict terminating Appellant's parental rights.

(8) October 18, 1979

The Court of Civil Appeals affirmed the judgment of the trial court.

(9) May 14, 1980

The Texas Supreme Court denied Appellant's Application for Writ of Error.

(10) July 23, 1980

The Texas Supreme Court overruled Appellant's Motion for Rehearing, thus making final the judgment of the Court of Civil Appeals.

Appellant's peaceful family life was abruptly interrupted four years ago when the state (Appellee) entered into the sphere of Appellant's private home life. In the summer of 1976, Appellant (born January 6, 1955) was living with her two minor children, J.W.B. and J.G.B.

On August 10, 1976, the state brought a Petition for Emergency Protection of Children against Appellant. Transcript p.3.

On presentation to a judge in chambers without notice to Appellant, the trial court issued an ex parte order to seize the two children and named the Taylor County Child Welfare Unit as temporary managing conservator of the children. Tr. p. 5. This event marked the beginning of a long, unfortunate, and eventful history of the present case.

Then on August 23, 1976, the state filed a petition seeking managing conservatorship of said children. The only allegation made by the state to support the pleading was that such managing conservatorship would be in "the best interest of the children." Tr. pp. 6-7. Again without notice and hearing, the trial court entered ex parte orders appointing the state as managing conservator and ordering Appellant to appear for hearing on September 7, 1976. Tr. p. 8. No attorney ad litem for the children was appointed at this time.

Appellant secured counsel and filed an answer of general denial on August 31, 1976. Tr. p. 9. On the same date, Appellant's parents (maternal grandparents of the children) filed a Plea in Intervention, praying that they be appointed temporary managing conservators of the children. Tr. pp. 10-12.

The cause then remained in limbo until August 15, 1977, when Appellee filed a petition to terminate Appellant's parental rights both to the two children previously seized and to a new child, K.L.B., born on February 1, 1977. Appellee's allegations, which tracked the statutory language of the Texas termination statute, stated:

> Appellant had,
>
> (1) voluntarily left the children alone or in the possession of another not the parent and expressed an intent not to return;
>
> (2) knowingly placed or knowingly allowed the children to remain in conditions or surroundings which endanger the physical or emotional well-being of the children;

(3) engaged in conduct or knowingly placed the children with persons who engaged in conduct which endangers the physical or emotional well-being of the children;

And that it would be in the best interest of the children to terminate the parent-child relationship. Tr. pp. 13-16.

Again, the same trial court issued ex parte orders, finding that Appellant would create a serious and immediate threat to the physical and emotional well-being of the children and setting a hearing for September 8, 1977. Brad Reid was at that time appointed attorney ad litem for the children. Tr. p. 17.

Pursuant to this litigation, a Social Study was prepared on Appellant's background and circumstances by one Catherine S. Stockton, Social Worker I, 203 W. Main, Arlington, Texas 76010. She was at that time an employee of the Texas Department of Human Resources. She found that Appellant planned to marry a man she was living with as soon as her divorce was granted from her previous husband. The divorce action had been filed by the Appellant and was a part of the pleadings, but not relevant to the issue at bar.

The social worker also found Appellant not to have any outstanding debts, cars paid for, and health and life insurance to cover her and the children. The social worker found Appellant living in a newly purchased mobile home with three bedrooms, two baths, a living room and kitchen area.

The social worker further found the home was well furnished and extremely clean and that she resided in a very well kept mobile park surrounded by a large wooded area. The social worker also found that the Appellant, anticipating her children's return, had child care plans worked out and that Dr. Li was the children's pediatrician. In summation, the social worker concluded that Appellant was stable in her job and living arrangement. See Tr. pp. 31-32.

The termination suit then came on to trial, and on October 19, 1977, the jury unanimously found that Appellant did not knowingly place or allow the children to

remain in conditions or surroundings which endangered the physical or emotional well-being of the children. The jury went on to find that it would not be in the best interest of the children to terminate Appellant's parental rights and that she should be appointed managing conservator of her children. Tr. pp. 39-44.

Pursuant to this jury verdict, the children were returned to Appellant, and Appellant and her new husband took up housekeeping in their home at Arlington, Texas.

Appellant's expectation of a happy family life with her children was short-lived, however. In addition to the stress of the prolonged litigation, Appellant experienced other forms of misfoutune. Her mother died of cancer after a prolonged illness. Her husband was injured on the job and could not work. The expenses of her legal defense was staggeringly high.

Faced with such overpowering financial and emotional distress, Appellant and her husband decided to place her children temporarily with Appellant's husband's parents for safekeeping. See Statement of Facts, 104-105, 834, 252. At no time did Appellant ever intend to abandon the children, however. SF. 688, 693, 256, 346-60, 168.

But Appellant's in-laws made one mistake. Not being overly endowed with money, they applied for assistance with Texas Department of Human Resources. Finding out that Appellant had left her children with her husband's parents, the state vengefully and without the required compelling state interests, returned to get the children from Appellant.

On February 21, 1978, only four months after the first termination trial ended in favor of Appellant and even before the Court entered its written judgment on the verdict, Appellee, the Taylor County Child Welfare Unit, filed another, identical termination

suit against Appellant and seized the children. Tr. 45-49.

Appellant was now penniless and unable to obtain the assistance of counsel.

The court ordered that a final hearing be held on August 3, 1978. On the very date of trial, Appellant managed to secure the services of a Legal Aid attorney. This attorney negotiated and secured for Appellant court-ordered visitation rights. Prior to this date, Appellant had not even been allowed to visit with her children, since they were seized six months before in February 1978. Appellee could do no less than admit their violations of Chapters 11, 14, and 17, Texas Family Code, as revealed in the Record. SF. 115-122.

Appellant moved to Abilene to be near her children who were under Appellee's possession and control and to give them gifts and clothing. SF. 149, 650, 425, 441.

In Appellant's answer and other pre-trial motions, Appellant's attorney raised the

constitutional issues now before this Court: the constitutional infirmity of the Texas termination statute and the violation of Appellant's due process right under the res judicata principle. See Tr. 55-57.

Appellant's Motion in Limine requesting the trial court to order the state not to introduce evidence which was barred by the res judicata doctrine was denied by the court. Tr. 64-65.

Nevertheless, Appellant's attorney persisted in objecting to the admissions of the inadmissible evidence at the voir dire, in the opening statement, and during the trial itself. SF. 13, 69, 472, 473; Tr. 64-65, 66-67. But Appellant's objections were to no avail in the trial court, and subsequently the same fell upon deaf ears with the state appellate courts.

Furthermore, the state's attorney was malicious and inflammatory at the trial of the cause. The state's attorney introduced

all the harmful testimony and evidence, which should have been excluded on the grounds of res judicata and hearsay, and this inevitably resulted in irreparable injury and a prejudicial trial. Appellant's attorney strenuously objected to the introduction of such inflammatory evidence and challenged it as reversible error because of its cumulative effect.

Moreover, the children's valuable right to stay and live with their natural parent or where placed by that parent, was never adequately protected at trial. Although an attorney ad litem for the children was appointed by the court, his role at the trial was de minimus. The attorney ad litem acted like a bystander at the trial, made no efforts to protect the children's interests, and made no objections when inadmissible testimony was adduced by the state's attorney. For instance, during the time the children were under the state's possession and control,

they suffered physical abuse by the foster homes. The attorney ad litem was not even concerned with such child abuse inflicted by the foster families and never challenged the unlawful attachment of the children.

At this trial in which Appellant's due process right to fair trial was totally denied and the unconstitutionally vague Texas termination statute was applied, Appellant lost her valuable parental rights. The jury found on November 7, 1978, that Appellant's conduct toward her children and the best interest of the children dictated the termination of the parent-child relationship between Appellant and the children and that the state should be appointed the children's managing conservator. Tr. 69-74. The trial court entered a judgment of termination on December 21, 1978, in accordance with the jury findings. See Appendix B.

Appellant repeated the same challenges and objections, thus preserving the right

of review on appeal, at every stage of subsequent state court procedure, including Motion for New Trial, appeal to the Texas Court of Civil Appeals, and Application for Writ of Error and Motion for Rehearing to the Texas Supreme Court.

SUBSTANTIALITY OF FEDERAL QUESTIONS

This appeal presents an important and substantial federal question in that annually a large number of Texas citizens with minor children are involved in issues of divorce, child custody, adoption, or termination of parental rights, and consequently many of them are subjected to the penalties described by the vague and indefinite language of the Texas termination statute. Another substantial federal question is involved here in that Appellant was twice put in jeopardy in a quasi-criminal proceeding despite the doctrine of res judicata, and therefore she was denied the due process right under the Fourteenth Amendment. A review by this court is called for to determine whether

the circumstances attending the Appellant's second trial were such as to deprive her of a right secured to her by the Constitution of the United States. Turner v. Louisiana, 379 U.S. 466, 467 (1965). These two questions are of the Constitutional dimension that deserves plenary review by this court.

I

At stake are the rights of parents to uninterrupted family life and healthy parent-child relationships, one of the most fundamental and precious rights protected by the great tradition of the common law and the Constitution of the United States. Although this Court has not yet squarely passed on the constitutionality of termination statutes, this Court has written extensively upon the sanctity of the home and priceless value of family life.

This Court has early on recognized a Fourteenth Amendment right "to marry, conceive and to raise one's children", Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

This Court has further held that the right to the preservation of family integrity, Griswold v. Connecticut, 381 U.S. 479 (1965), and the existence of a "private realm of family life which the state cannot enter", Prince v. Massachusetts, 321 U.S. 158, 166 (1944), have their origins "not in state law, but in intrinsic human rights, as they have been understood in this Nation's history and tradition." Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977); Smith v. Organization of Foster Families, 431 U.S. 816, 845 (1977).

The right of a parent to the "companionship, care, custody, and management of his or her children" is "essential", Stanley v. Illinois, 405 U.S. 645, 651 (1972), and such rights are "far more precious...than property rights", May v. Anderson, 345 U.S. 528, 533 (1953), and one of "the basic civil rights of man." Skinner v. Oklahoma, 316 U.S. 536, 541 (1942).

This Court has said that "freedom of

personal choice in matters of...family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639-40 (1974). This Court has further declared, "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Prince v. Massachusetts, supra, at 166. See also Stanley v. Illinois, supra, at 651; Armstrong v. Manzo, 380 U.S. 545, 552 (1965); Duchesne v. Sugarman, 566 F.2d 817, 824-25 (2nd Cir. 1977).

For the state to infringe upon or interfere with a fundamental right, there must be a demonstration of compelling state interest. Roe v. Wade, 410 U.S. 113, 155 (1973); Wisconsin v. Yoder, 406 U.S. 205 (1972); Alsager v. District Court of Polk County, 406 F.Supp. 10 (S.D. Iowa, 1975),

affm'd 545 F.2d 1137 (8th Cir. 1976). A statute dealing with such fundamental rights must be narrowly and precisely drawn. Griswold v. Connecticut, 381 U.S. 479, 485 (1965). A statute purporting to intrude upon the "private realm of family life" is subjected to careful examination. Moore v. City of East Cleveland, supra, at 499; Zablocki v. Redhail, 434 U.S. 374, 383 (1978); Roe v. Conn., 417 F.Supp. 769, 779 (M.D. Ala. 1976). Therefore, in promulgating a statute or standard that regulates the private realm of family life, the state is obligated to prescribe it with "a greater degree of specificity than in other contexts." Smith v. Goguen, 415 U.S. 566, 573 (1974).

The Texas termination statute here in issue is precisely an antithesis of legislative clarity required in such a statute. A countless number of parents and children suffer, because they are

subjected to the vague and indefinite language of the Texas statute. The statute provides that parental rights can be terminated, if a parent commits one of the behaviors proscribed in Section 15.02(1) and if the termination of parental rights is in the "best interest" of the child, Section 15.02(2), Texas Family Code.

Not to mention the vagueness of the §15.02(1) provisions which proscribe certain parental behaviors, the term, "best interest of the child", in §15.02(2) is an epitome of a vague standard. It is hard to imagine a standard more vague and indefinite than this term. Nowhere in the statute is the term, "best interest", defined or elaborated, nor the courts of Texas have ever defined or limited the term. In fact, it is impossible to define such an all-inclusive and often-elusive term. It does not set any guidelines. Nevertheless, it gives unfettered discretion to a judge or jury. In the hands of

untutored people, it is an all-powerful weapon that can be used for proper as well as improper purposes.

The statute, proscribing parental behaviors and employing the best interest test, is unconstitutionally vague, because it fails to notify parents of the kind of conduct proscribed under the statute. Such a statute results in the imposition of penalties upon parents whose only offense was in not behaving in a manner which a judge or jury personally and subjectively considers acceptable.

A statute of this kind cannot stand the exacting constitutional scrutiny, "if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." Giaccio v. Pennsylvania, 382 U.S. 399, 402-403 (1966).

See also A.B. Small Co. v. American Sugar Refiner Co., 267 U.S. 233, 239 (1925); Grayned v. City of Rockford, 408 U.S. 104 (1972). Gelling v. Texas, 343 U.S. 960 (1952) held that a city ordinance, the language of which contained "as to be prejudicial to the best interests of the people of said city" was unconstitutionally "vague and indefinite." Concurring opinion by Justice Frankfurter at 960. Recently, this court suggested that "the best interests of the child" could be characterized as "vague". Smith v. Organization of Foster Families, supra, at 835, n. 36. Appellant contends that no criteria are offered by the Texas statute for assessing the prohibited parental behaviors or measuring the "best interest" of the child.

No amount of logic or judicial twisting of the language of the Texas statute can make it satisfy the criteria established by this Court, which require "ascertainable standards" of judgment and sufficiently

specific language that can be understood (not guessed at) by a person of ordinary intelligence. Connally v. General Construction Co., 269 U.S. 385, 391 (1926); United States v. Cohen Grocery Co., 255 U.S. 81, 89 (1921); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972).

Furthermore, the Texas termination statute constitutes a violation of a parent's rights to equal protection of the laws, because it permits an impermissible class-based intrusion upon the family. The statute is most effectively and most often used to disfavor the rights of the poor parent, the non-conformist parent, the uneducated parent, the very young parent, and those parents who are incapable, at the time of trial, of providing a court-approved level of care to the child because of family disruptions, post-divorce crises, or lack of knowledge and training in proper child rearing procedures, all of which conditions are temporary and remediable.

See In the Matter of R-E-W, 545 SW2d 573 (Tex. Civ. App. - Houston (1st Dist.), 1976, writ ref'd, n.r.e.); Papachristou v. City of Jacksonville, supra, at 170-71.

A legislation that condemns certain behaviors as "bad" invariably reflects social value and morality. State power too often has been used to reinforce public morality rather than to protect children from neglect or abuse. Unless scientific evidence (rather than moral evidence) is employed in termination cases, children will be constantly removed from parents at any time the beliefs and values of the "dominant sector of society" are violated. See Wald, "State Intervention on Behalf of Neglected Children," Stanford Law Review, 27 (April 1975); Mnookin, "Foster Care - In Whose Best Interest?" Harvard Educational Review, 43 (1974); Hilary Rodham, "Children Under the Law", Harvard Educational Review, 43 (1974); requoted from Wiltse, "Foster Care in the 1970's: A Decade of Change",

Children Today, May-June, 1979, 12.

It is no reason to terminate parental rights only because the court disapproves of the parent's life style or child rearing practices. A parent's behavior which may be unacceptable by the dominant sector of society should not be condemned on the pretext of acting in the best interest of the child. That the parents are not married, that they adhere to extreme religious beliefs, that they live in a communal setting, that their home is filthy, that the mother frequents taverns, or that the woman is the mother of an illegitimate child, should not be used as an excuse to terminate parental rights of such parents. Wiltse, id.

As a matter of fact, our society is not built upon perfection nor standardization. The strength of our society lies in its cultural pluralism and individual initiative. The "best interest of the child" merely states a noble proposition.

Parental behaviors as condemned "bad" and listed in Section 15.02(1) may be outlawed in a flawless, dictorial, and standardized society. These standards, however, defy definition and measurement. They do not establish any guidelines. This Court must halt and prevent the further use of the vague standards prescribed in Section 15.02 of the Texas Family Code, unless and until a workable and measurable definition can be developed either by statute or by the courts.

That the Texas termination statute can be interpreted in as many different ways by as many triers of fact was clearly demonstrated in a few cases this Counsel is personally familiar with. The present case may be one of the most conspicuous examples. As has been stated, the present case went on for trial two times on the same charges and same evidence. Appellant was exonerated of the charges by a first jury on October 19, 1977. But, when the state

brought another identical suit within four months after the first trial, the second jury found her guilty on the same charges and same evidence.

Another case in point is In the Interest of G.M. et al, 596 SW2d 846 (Tex. 1980), a parental rights termination case under the Texas statute that originated in Lubbock, Texas. At the first trial, the trial court found the mother had "not fulfilled the proper parental duties under Section 15.02, Texas Family Code" and further found "termination of the parent-child relationship...is in the best interest of the children." Then the case was reversed and remanded by the Texas Supreme Court. The jury in the second trial, after hearing the virtually identical evidence, returned a verdict that termination was not in the best interest of the children.

It is not surprising that state termination statutes employing essentially

similar language have been held invalid at least by two federal courts. Roe v. Conn, 417 F.Supp. 769 (M.D. Ala. 1976) held the Alabama termination statute unconstitutionally vague, and the Iowa termination statute was likewise held invalid for the same reason in Alsager v. District Court of Polk County, supra.

Furthermore, a few enlightened state supreme courts followed suit and invalidated their parental rights termination statutes on the grounds of vagueness and indefiniteness. For example, the Arkansas Supreme Court held that the Arkansas termination statute using the term, "a proper home," was "unconstitutionally vague", because it "does not provide sufficient guidelines to meet the due process requirements" of the United States Constitution and the Arkansas Constitution. Davis v. Smith, 583 S.W2d 37, 40 (Ark. 1979).

Quoting from Roe v. Conn, supra, the Arkansas Court further stated,

> Obviously, this is a question about which men and women of ordinary intelligence would greatly disagree. Their answers would vary in large measure in relation to their differing social, ethical, and religious views. Because these terms are too subjective to denote a sufficient warning to those individuals who might be affected by their prescription, the statute is unconstitutionally vague. Davis v. Smith, supra, at 43-44.

The Supreme Court of Nebraska held the Nebraska termination statute, which adopts the test of "the best interest and welfare of the children", "being vague and lacking in adequate and understandable standards of conduct to which parents should conform so as not to risk the termination of parental rights, violates the due process requirements... and is therefore unconstitutional and void." Linn v. Linn, 286 N.W.2d 765 (Neb. 1980).

These decisions are based upon many of the same authorities and arguments Appellant is now providing this Court in the present Jurisdictional Statement. The trend seems

obvious. It is apparently moving toward the direction of invalidating vague and indefinite termination statutes. It is obvious that the Texas termination statute as well as those of other states will be invalidated sooner or later. But, in the meantime, a countless number of parents and children will be subjected to such unconstitutional statutes. It will take a long time to invalidate these state statutes on a state-by-state piecemeal basis. Therefore, it is highly desirable and advisable that this Court halt and correct this unhappy situation by invalidating such state statutes at one stroke.

II

The theory and practice of res judicata is a well established doctrine in Anglo-American jurisprudence as well as in Texas. A final judgment on the merits, rendered by a court of competent jurisdiction, is conclusive as to the rights of the parties and their privies, and as to them consti-

tutes an absolute bar to a subsequent action involving the same claim, demand, and cause of action. United States v. International Building Co., 345 U.S. 502, 504 (1953); Lawlor v. National Screen Service Corp., 349 U.S. 322, 326 (1955);

"The judgment puts an end to the cause of action, which cause cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment." Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 597 (1948). Although the doctrine is a judicially created one, it exists "as an obvious rule of reason, justice, fairness, expediency, practical necessity, and public tranquillity. Public policy, judicial orderliness, economy of judicial time, and the interest of litigants, as well as the peace and order of society--- all require that stability should be accorded judgments, that controversies

once decided on their merits shall remain in repose, that inconsistent judicial decisions shall not be made on the same set of facts, and that there be an end to litigation, which, without the doctrine of res judicata, would be endless." 46 Am. Jur 2d Judgments, §395. See also Partmar Corp. v. Paramount Pictures Theaters Corp., 347 U.S. 89, 90-91 (1954); Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 578-79 (1974); Heiser v. Woodruff, 327 U.S. 726, 733 (1946); Schroeder v. 171.74 Acres of Land, 318 F.2d 311, 314 (8th Cir. 1963); Ballard v. First National Bank of Birmingham, 259 F.2d 681, 684 (5th Cir. 1958); Permian Oil Co. v. Smith, 107 SW2d 564, 566 (Tex. 1937); Daniel v. Kittrell, 188 SW2d 404, 406 (Tex. Civ. App. - Waco, 1945, no writ); Fireman's Fund Ins. Co. v. Bybee, 322 SW2d 657, 658 (Tex. Civ. App. - Eastland 1959, error dism'd).

Although the Texas Family Code defines the termination suit as a civil proceeding

and dictates the application of rules of civil procedure, the substance of the proceeding is no different from a criminal proceeding. The state with all its formidable power and resources is the prosecuting party against the powerless and often penniless individual parents. The state's prosecution on behalf of the alleged best interest of the child is no different from its function of the protection of society in a criminal proceeding.

In a termination proceeding, more than mere money damages are involved. It involves a penalty as severe as the total and permanent deprivation of one's parental rights. Once the parental rights are terminated, under the Texas statute, it is irrevocable, unmodifiable, permanent, and final. It means a total loss and complete separation of the parent-child relationship. Indeed, no penalty as severe and as harsh can be imagined. As a court aptly stated, "Indeed it is not unlikely that many parents would

choose to serve a prison sentence rather than to lose the companionship and custody of their children." Davis v. Page, 618 F.2d 374, 379 (5th Cir. 1980), En banc rehearing granted.

The stigma and dishonor attached to a parent whose child has been taken away by the state would certainly be worse and more humiliating than any penalty suffered in a criminal conviction. It would be to exult the form over substance to say that a termination suit is a mere civil proceeding. A termination proceeding has in substance all the severity and harshness of a criminal prosecution. Therefore, Appellant insists that it should be regarded as a criminal proceeding or at the minimum it should be treated as a quasi-criminal proceeding. See Danforth v. State Department of Health and Welfare, 303 A.2d 794 (Me. 1973).

This Court has held that "A proceeding where the issue is whether the child will

be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution." Application of Gault, 387 U.S. 1, 36 (1967). Recently, another court found that even a dependency proceeding, which is far less severe than a termination proceeding, "closely resembles the loss of liberty which attends a criminal proceeding." Davis v. Page, supra, at 382.

An accused, as a matter of constitutional law, has the right not to be twice put in jeopardy. United States v. Benz, 282 U.S. 304, 307 (1931). The constitutional provision against double jeopardy protects an accused not only against the peril of a second punishment, but also against being tried again for the same offense. Stroud v. United States, 251 U.S. 15, 18 (1920); Crist v. Bretz, 98 S.Ct. 2156, 2160 (1978); Arizona v. Washington, 434 U.S. 497, 503 (1978).

This Fifth Amendment right has been held applicable to states through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 794 (1969).

The state brought the second termination suit identical in its charges against Appellant on February 21, 1978, only four months after the first termination prosecution ended in acquittal. The state was clearly violating the constitutional mandate and such action by the state constituted an unwarranted deprivation of Appellant's rights protected by the Constitution of the United States.

This Court has held that if the second action, although civil in form, is quasi-criminal in nature, the second prosecution is barred by a prior conviction or acquittal. This rule applies more rigidly where the party bringing the second suit is the state. Coffey v. United States, 116 U.S. 436 (1886); Chantango v. Abaroa, 218 U.S. 476, 481-82 (1910).

Even if it is conceded that a termination suit is a pure civil proceeding, the doctrine of res judicata should have the same effect as the double jeopardy doctrine. Appellant's due process right under the Constitution dictates that the state be barred from initiating a termination suit for the second time.

When the state filed the second termination suit against Appellant, as a matter of procedural rule under the Texas Rules of Civil Procedure, the trial court was still retaining the jurisdiction over the first termination suit. Technically, the first suit was still pending, because the trial court had not entered a written judgment until March 7, 1978. Rule 306(a), Texas Rules of Civil Procedure. The state, if any, should have filed a motion for new trial or should have appealed to the Court of Civil Appeals. Also, the trial court should have dismissed the second suit on its own motion. Taking advantage of the

situation that Appellant secured no counsel, the state and the trial court took action improper and violative of Appellant's due process right to a fair trial.

If the state were allowed to keep bringing the same termination suit over and again against the same parent and the parent were compelled to defend such suits over and again, until the state is successful to terminate the parent's parental rights and the parent loses the game, it would be a mockery of justice, fairness, and due process requirements. The res judicata doctrine exists precisely to prevent this kind of injustice and denial of due process.

This Court has aptly stated:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even-though innocent, he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88 (1957).

If the parent has no second opportunity to contest a termination decree, a fortiori the state should not be allowed to come back to get the parent again and again. The high regard for the parental rights recognized by this Court compels that the doctrine of res judicata or double jeopardy be strictly applied to a termination proceeding.

Every accused person has an absolute due process right to a fair and impartial trial, and the duty rests upon the courts, and also on the prosecuting attorney, to see that this right of the accused is upheld and sustained. Ponzi v. Fessenden, 258 U.S. 254, 260 (1922); Long v. State, 59 Tex. Crim. App. 103, 127 S.W. 551 (Tex. Crim. App. 1910). See also ABA, Code of Professional Responsibility, DR7-103. This means that a trial must be reasonably free of prejudicial and

harmful errors, and the prosecuting attorney's first priority is not to obtain a conviction of the accused but seeing to it that justice be done.

The state and its attorney, acting in bad faith and vendetta, manifested a malicious approach in the prosecution. As stated above, under the Texas Rules of Civil Procedure, the state should have appealed the trial court judgment rather than filing a new suit. Even conceding that the state's allegations were based on the Appellant's conduct after the return of the jury verdict at the first trial, the state should have filed a motion for new trial on the grounds of newly discovered evidence.

Further conceding that the state was justified in bringing the second suit, the evidence which had been introduced and considered at the first trial should have been excluded under the doctrine of res judicata. In fact, Appellant filed a

pre-trial Motion in Limine precisely for this purpose -- to prevent the state from introducing the old evidence which had been considered at the first trial. The trial court with no comment or reason mysteriously denied this motion, and the state attorney flagrantly violated even this minimal decency and minimal standard of a fair trial.

A most conspicuous example of the state attorney's vendetta and inflammatory remark can be found in the state attorney's questioning of Appellant.

> "You filled out an eligibility form over at Legal Aid, didn't you?" SF. 652

The state's attorney made further remarks on the subject of Appellant's having secured a Legal Aid attorney, implying that she was too poor to care for her children. SF. 653-54. It has been held improper and prejudicial to inquire into the eligibility of a party for legal services. Morton v. Hall, 444 F.Supp. 34 (S.D. Fla. 1977);

Dixon v. Georgia Indigent Legal Services, 388 F.Supp. 1156 (S.D. Ga. 1975), affm'd 532 F.2d 1373.

Appellant properly objected to the state attorney's interjection of res judicata matters at the voir dire, in the opening statement, and in the course of the trial itself. In fact, the state attorney's persistent effort to admit inadmissible and inflammatory evidence caused Appellant's counsel to repeat objections. This had an extremely prejudicial and harmful effect on the jury. Whereupon Appellant raised the point of cumulative error on appeal. As the Texas Supreme Court stated, when "the cumulative effect of all these statements could not have been cured by instructions from the trial court" and when it "was reasonably calculated to cause and probably did cause the rendition of an improper judgment," such judgment must be reversed.

Southern Pacific Co. v. Hubbard, 297 SW2d 120, 126 (1956). See also Smerke v. Office Equipment Co., 158 SW2d 302 (Tex. Com'n App. 1941); Sherwood v. Murray, 233 SW2d 879 (Tex. Civ. App. - El Paso, 1950, no writ). Such persistency on the part of the state's attorney was clearly a violation of Appellant's due process right to fair trial and justice. Judging from the totality of the circumstances as partially presented above, it is clear that the state's motive in the second suit was vendetta, malice, and harassment.

Furthermore, Appellant and her children suffered irreparable harm and injury at the trial due to the fact the attorney ad litem appointed by the court to protect the interests of the children was incompetent and neglectful in his role as advocate of the children's interests. The interest of a child in a healthy family life and stable parent-child relationship is no less important. As this Court has recog-

nized, the children have the right not to be dislocated from the "emotional attachments that derive from the intimacy of daily association" with their parents. Smith v. Organization of Foster Families, supra, at 844.

An attorney ad litem is not a mere window-dressing. He has a high degree of duty, comparable to that of a guardian or trustee, to protect the interests of the minor he is representing. His duty is "to see that all interests of the incompetent are fully presented to the court." 1 McDonald, TEXAS CIVIL PRACTICE, 257. It has been held that an attorney ad litem can neither waive a substantial right of an infant nor consent to anything that will prejudice the infant. Wright v. Jones, 52 SW2d 247 (Tex. Com'n App. 1932); Watson v. Glenn, 82 SW2d 704 (Tex. Civ. App. - Austin, 1935).

The court-appointed attorney ad litem in the present case did not fulfill his duty to protect the children's interests at trial. His conduct was perfunctory throughout the entire proceeding. He totally abdicated his function as advocate of the children. One of the substantial rights a child has is the natural presumption that his interests are best served when placed with his natural parent. See Prince v. Massachusetts, supra, at 166. Nevertheless, the attorney ad litem made no efforts whatever to insure the interests and welfare of the children. The children and their interests were abandoned, not represented, in the courtroom by the attorney ad litem. The children's rights to due process and to representation were miserably denied.

This Court has early held that the children are equally protected by the Fourteenth Amendment and the Bill of Rights.

Application of Gault, 387 U.S. 1, 13 (1967). To insure at least a consistent and minimal standard of representation, this Court should at least declare that representation of children's interests at a termination trial is a matter of due process right guaranteed by the Constitution of the United States.

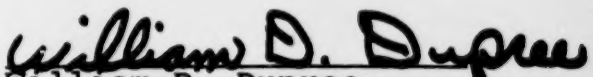
In light of the facts presented above, Appellant requests this Court pass on the questions (1) whether the Texas termination statute is unconstitutionally vague on its face and as applied to Appellant and (2) whether Appellant's due process rights were violated under the circumstances attending the trial that terminated the parent-child relationship between Appellant and her three children.

CONCLUSION

For the foregoing reasons, this Court should take jurisdiction of this appeal, or in the alternative, grant writ of certiorari

to consider the questions raised herein, and set the case for plenary hearing and argument.

Respectfully submitted,



William D. Dupree
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(817) 336-3943

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I, William D. Dupree, Attorney for Appellant, do hereby certify that I mailed three (3) true and correct copies of the foregoing Jurisdictional Statement to:

Hon. Mark White
Attorney General
State Capitol
Austin, Texas 78711

Ms. Sharon Johnson
Assistant District Attorney
Taylor County Courthouse
Abilene, Texas 79602

by depositing such copies in the United States mail, Fort Worth, Texas, with first class postage prepaid and properly addressed to the post office addresses of the said parties on this 17 day of September, 1980. I further certify that all parties required to be served have been served.

William D. Dupree
William D. Dupree

APPENDIX A

Judgment of the 326th District Court, Taylor County, Texas, appointing Appellant as Managing Conservator of the children, rendered March 7, 1978.

IN THE INTEREST OF	X	IN THE 326TH DISTRICT
JOHN WILLIAM BERRY AND JAY GLENN BERRY AND CRYSTAL LYNN BOGGS, CHILDREN	X	COURT OF TAYLOR COUNTY, TEXAS

ORDER

On the 17th day of October, 1977, Petitioner appeared in person and by attorney and announced ready for trial.

Respondent, Kay Boggs, appeared in person and by attorney and announced ready.

Also appearing was Brad Reid, appointed by the Court as guardian ad litem of the children the subject of this suit.

The Court, having considered the pleadings and heard the evidence and argument of counsel, finds that all necessary prerequisites of law have been legally satisfied and that this Court has jurisdiction over the parties and subject matter of this cause.

The Court finds that it has jurisdiction over and that this proceeding concerns the following children:

NAME: John William Berry SEX: Male
BIRTHPLACE: Bryan, Texas
BIRTH DATE: November 9, 1973
PRESENT RESIDENCE: Taylor County Child Welfare Foster Care

NAME: Jay Glenn Berry SEX: Male
BIRTHPLACE: Oklahoma City, Ok.
BIRTH DATE: December 5, 1974
PRESENT RESIDENCE: Taylor County Child Welfare Foster Care

NAME: Krystal Lynn Boggs SEX: Female
BIRTHPLACE: Abilene, Texas
BIRTH DATE: February 1, 1977
PRESENT RESIDENCE: Taylor County Child Welfare Foster Care

Upon the close of all evidence and argument by counsel, this cause as it effects the parental rights of Kay Boggs was submitted to a jury on special issues which found the following:

That the preponderance of the evidence did not show that Kay Boggs Morris knowingly placed or allowed the children to remain in conditions or surroundings which endangered the physical or emotional well-being of the children.

That the preponderance of the evidence did show that Kay Boggs Morris has engaged in conduct or knowingly placed the children with persons who engaged in conduct which endangered the physical or emotional well-being of the children.

That the preponderance of the evidence did not show that it would not be in the best interest of the minor children to appoint their mother, Kay Boggs Morris, as their managing conservator.

Therefore, the Court finds that the following orders for the safety and welfare of the children are in the best interest of the children:

IT IS ORDERED AND DECREED that Kay Boggs Morris be and is hereby appointed managing conservator of the children the subject of this suit, the Court finding this appointment to be in the best interest of the children.

IT IS ORDERED that the managing conservator shall have all the rights, privileges, duties, and powers of a parent, to the exclusion of the other parent, subject to the rights, privileges, duties, and powers granted to any possessory conservator named in this order.

IT IS ORDERED that Beula Wynne Love, Supervisor of Taylor County Child Welfare Unit, or her successors in office, be and is hereby appointed possessory conservator of the children the subject of this suit.

IT IS ORDERED that the possessory conservator shall have possession of or access to the children at any time and place that there is an immediate threat to their health or physical safety.

IT IS ORDERED that the possessory conservator shall have the following rights, privileges, duties and powers during the period of possession:

(1) the duty of care, control, protection, and reasonable discipline of the children;

(2) the duty to provide the children with clothing, food, and shelter;

(3) the power to consent to medical and surgical treatment during an emergency involving an immediate danger to the health and safety of the children.

The Court finds that the child John William Berry was born out of wedlock and is not legitimate as to any man, that the alleged biological

father is Raymond Beadle, Jr., that he has failed to establish any right or intent in or to the child, and that the parent-child relationship between such biological father and such child does not exist in law or in fact, and it is accordingly so DECREED.

Father, Raymond Beadle, Jr., has executed an Affidavit of Waiver of Interest as to the child, including a waiver of notice and of service of citation, which affidavit is filed in this cause, and it is therefore DECREED that he has no interest whatsoever in or to the child, and all rights, parental or otherwise, which Raymond Beadle, Jr. may have in and to the child, John William Berry, is hereby terminated and decreed to no longer exist either in fact or in law.

The Court finds that James Hugh Boggs, the father of the child Crystal Lynn Boggs, has executed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided by section 15.03 of the Texas Family Code.

The Court also finds that termination of the parent-child relationship between James Hugh Boggs and the child Crystal Lynn Boggs is in the best interest of the child.

IT IS THEREFORE DECREED that the parent-child relationship between James Hugh Boggs and the child Crystal Lynn Boggs be and it is hereby terminated.

IT IS ORDERED that all records in this case, including the minutes, be sealed.

SIGNED this 7th day of March, 1978.

(Signed)

HENRY J. STRAUSS
Judge, 326th District Court
Taylor County, Texas

Endorsed: 12,188-DR, In RE: John William & Jay Glenn Berry & Crystal Lynn Boggs, children, Order, as recorded in Vol. 2, page 733

APPENDIX B

Judgment of the 326th District Court, Taylor County, Texas, terminating Appellant's parental rights, rendered December 21, 1978.

IN THE INTEREST OF	X	IN THE 326TH DISTRICT COURT
JOHN WILLIAM BERRY, JAY GLENN BERRY, AND CRYSTAL LYNN BOGGS, CHILDREN	X	OF
	X	TAYLOR COUNTY, TEXAS

DECREE OF TERMINATION

On the thirtieth day of October, 1978, Petitioner appeared in person and by attorney and announced ready for trial.

Respondent, Kay Morris, appeared in person and by attorney and announced ready for trial.

Also appearing was Brad Reid, appointed by the Court as guardian ad litem of the children the subject of this suit.

The Court having considered the pleadings and heard the evidence and argument of counsel, finds that all necessary prerequisites of the law have been legally satisfied and that this Court has jurisdiction over the parties and subject matter of this cause.

Upon the close of all the evidence and argument by counsel, this cause as it effects the parental rights of Kay Morris was submitted to a jury on special issues which found the following:

That from clear and convincing evidence Kay Morris voluntarily left the children alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the children and remained away for a period of at least three months.

That from clear and convincing evidence Kay Morris knowingly placed or allowed the children to remain in conditions or surroundings which endangered the physical or emotional well-being of the children.

That from clear and convincing evidence Kay Morris has engaged in conduct or knowingly placed the children with persons who engaged in conduct which endangered the physical or emotional well-being of the children.

That from clear and convincing evidence termination of the parent-child relationship between Kay Morris and the children would be in the best interest of the children.

That from clear and convincing evidence, and considering the best interest of the children that the Taylor County Child Welfare Unit should be appointed managing conservator of the children.

Therefore, the court finds that the following orders for the safety and welfare of the children are in the best interest of the children who are the subject of this suit.

IT IS ORDERED AND DECREED that the parent-child relationship between Kay Morris and the children the subject of this suit be and it is hereby terminated.

IT IS FURTHER ORDERED that Buela Wynne Love, Supervisor, Taylor County Child Welfare Unit, or her successors in office, be and is hereby appointed managing conservator of the children the subject of this suit.

IT IS ORDERED that the managing conservator shall have all the rights, privileges, duties, and powers of a parent, to the exclusion of the other parent, subject to the rights, privileges, duties, and powers granted to any possessory conservator named in this order.

IT IS ORDERED that all records in this cause, including the minutes, be sealed.

SIGNED this 21 day of December, 1978.

(Signed)
HENRY J. STRAUSS
Judge, 326th District Court
Taylor County, Texas

Approved as to form:

(Signed)
Attorney for Respondent

(Signed)
Guardian ad Litem

(Signed)
Attorney for Petitioner

Endorsed: 12,188-Dr, In RE: John William & Jay Glenn Berry & Crystal Lynn Boggs, children, as recorded in Volume 3, page 298

APPENDIX C

Opinion and Judgment of the Texas Court of Civil Appeals, 11th Supreme Judicial District, affirming the District Court judgment, rendered October 18, 1979.

JUDGMENT

In Re: J.W.B., J.G.B. and K.L.B.	X	From the 326th District Court of Taylor County.
No. 5314	X	October 18, 1979
		Opinion by McCloud, C.J.

This cause came on to be heard on the record and the same being inspected, it is the opinion of the Court that there was no error in the judgment. It is therefore ordered, adjudged and decreed that the judgment of the trial court be, and the same is hereby, in all things affirmed, in accordance with this Court's opinion, and that this decision be certified below for observance.

In Re: J.W.B., J.G.B., and K.L.B.

No. 5314--Appeal from Taylor County

The mother, K.B.M., appeals the judgment terminating her parent-child relationship with three minor children. We affirm.

The jury found that termination of the parent-child relationship would be in the best interest of the children and that the mother:

(1) voluntarily left the children alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the children and remained away for a period of at least three months.

(2) placed or allowed the children to remain in conditions or surroundings which endangered the physical or emotional well-being of the children.

(3) engaged in conduct or knowingly placed the children with persons who engaged in conduct which endangered the physical or emotional well-being of the children.

The mother first argues that, "excluding improper hearsay and res judicata testimony," there is no evidence, or alternatively, factually insufficient evidence to support the jury's findings.

We hold the evidence is sufficient, both legally and factually, to support the jury's finding that the mother engaged in conduct which endangered the physical or emotional well-being of the children, and that termination of the parent-child relationship between the mother and the children would be in the best interest of the children. Our holding makes it unnecessary to discuss the other jury findings.

When considering the "no evidence" points, we can only consider the evidence and inferences tending to support the jury findings and must disregard all evidence and inferences to the contrary. Holley v. Adams, 544 SW2d 367 (Tex. 1976). We must consider all the evidence in deciding the factually insufficient points. In re King's Estate, 244 SW2d 660 (Tex. 1951).

The mother voluntarily placed her children with the Taylor County Child Welfare Unit in May, 1976. They were returned to the mother about a month later, but in September, 1976, as a result of a complaint, a suit affecting

the parent-child relationship was filed. The Taylor County Child Welfare Unit was named managing conservator. The children were placed in the home of the mother's parents where the mother was, at that time, living. Further complaints were received, and a termination suit was filed in 1977. On October 19, 1977, a jury in Taylor County found that the mother had engaged in conduct or knowingly placed the children with persons who engaged in conduct which endangered the physical or emotional well-being of the children. The jury, however, at that time, found that termination of the parent-child relationship between the mother and the children would not be in the best interest of the children. The instant termination suit was filed February 21, 1978.

Shortly after regaining possession of her children, following the jury verdict in the first termination suit, the mother left the children with her new in-laws. About a week later, she left for Las Vegas without telling her husband

or the people keeping the children where she was going. She hitchhiked to Las Vegas via California. While she was away for several weeks, her children were again delivered to a child welfare agency.

Susan Bennett, the mother's neighbor in Arlington, Texas, testified that the children often played in the street. She testified about an event in November, 1977, as follows:

> A I heard a child crying, and he was losing his breath he was crying so hard. I went and looked out my bedroom window to see if I could tell where the crying was coming from. It was coming from Kay's house. I could hear Kay's voice. I couldn't understand what she was saying, but she was screaming at the child, and then I could hear a slapping sound, and the child continued to cry and cry. After maybe fifteen or twenty minutes, I got so upset that I walked out in the yard, and the child continued to cry through all this time. She continued the slapping, or I could hear the slapping sound, and then, one time, I heard her say, "I am going to beat you G.D. ass off if you don't stop crying." This went on until like a quarter until 4:00.
>
> Q Okay. And when did it begin?
>
> A Around 2:45.

Mrs. Bennett stated that the mother told her that she disciplined her children by making them eat Tide washing powder for talking back to her and hot peppers for lying to her. Mrs. Bennett said that the children's hair was matted and oily, and that their clothes were always dirty and stained.

Dr. Norman Stone tested two of the children. His testimony constitutes some evidence that the anxiety and depression suffered by the children were caused by the acts and omissions of the mother.

The mother's former husband testified that, on one occasion, he returned home and found that the mother had taken an overdose of barbiturates while the children were asleep in another room. He stated that he often came home to find the children's diapers soaked. He said that the mother would frequently go off on weekends and stay out all night. He testified that the mother neglected the children and that they were often left wet and hungry.

The evidence of instability, neglect and mistreatment, coupled with the expert testimony, is such that the jury could properly conclude that the mother had engaged in conduct endangering the physical or emotional well-being of the children.

We hold there is some evidence to support the jury's findings, and the evidence is factually sufficient to support the findings.

The mother next urges that the court erred in permitting evidence of events occurring prior to the first termination case. She asserts that such evidence was inadmissible under the doctrine of res judicata. The mother waived her objection to such evidence. The record is filled with evidence, admitted without objection, of events that occurred before the 1977 termination suit. The mother filed a motion in limine requesting that all witnesses be instructed not to testify as to any matter occurring prior to the first termination suit. The granting or denying of a motion in limine can never constitute

reversible error. Hartford Accident and Indemnity v. McCardell, 369 SW2d 331 (Tex. 1963).

The mother urges that the court erred in the form of the submitted issues. She argues that the issues are erroneous because they contain more than one ground of recovery. First, we note that the mother failed to properly object to the submitted issues. TEX. R. CIV. P. 274. Furthermore, we point out that TEX. R. CIV. P. 277 provides, "It shall not be objectionable that a question is general or includes a combination of elements or issues." See Scott v. Atchison, Topeka and Santa Fe Railway Company, 572 SW2d 273 (Tex. 1978).

The mother's points attacking the constitutionality of "Chapter 15" of the Texas Family Code are overruled. D-F v. State, 525 SW2d 933 (Tex. Civ. App. - Houston (1st Dist.) 1975, no writ); Sanchez v. Texas Department of Human Resources, 581 SW2d 260 (Tex. Civ. App. - Corpus Christi 1979, no writ).

We have considered all points of error, and all are overruled. Judgment of the trial court is affirmed. It is further ordered that this opinion not be published in accordance with TEX. R. CIV. P. 452.

(Signed)
AUSTIN MCCLOUD
CHIEF JUSTICE

October 18, 1979

APPENDIX D

Order of the Texas Supreme Court, Denying Application for Writ of Error, no reversible error, rendered May 14, 1980.

CLERK'S OFFICE - SUPREME COURT

Austin, Texas

May 14, 1980

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of B-9024, IN RE: J.W.B., J.G.B. AND K.L.B.

was this day refused. No reversible error.

Very truly yours,

GARSON R. JACKSON, Clerk

APPENDIX E

Order of the Texas Supreme Court, Overruling Motion for Rehearing, rendered July 23, 1980.

CLERK'S OFFICE - SUPREME COURT

Austin, Texas,

July 23, 1980

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of B-9024, IN RE: J.W.B. J.G.B. AND K.L.B.

was this day OVERRULED

Very truly yours,

GARSON R. JACKSON, Clerk

APPENDIX F

Notice of Appeal to the Supreme Court of the United States, filed July 30, 1980.

NO. 9024

IN RE: J.W.B.	X	IN THE SUPREME COURT
J.G.B., AND K.L.B.		OF TEXAS
CHILDREN	X	AUSTIN, TEXAS

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE is hereby given that Kay Boggs Morris, the Appellant in the above-entitled and numbered cause, hereby appeals to the Supreme Court of the United States from the final judgment, and denial of a Motion For Re-Hearing filed with the Texas Supreme Court was overruled July 23, 1980, affirming the decision of the Court of Civil Appeals, Eleventh Supreme Judicial District, entered in this suit on the 18th of October, 1979, overruling Appellant's Complaint as to the constitutionality of Chapter 15, Texas Family Code, holding same to be constitutional.

This Appeal is taken pursuant to Title 28, United States Code, Section 1257, Subparagraph 2,

DATED this 30 day of July, 1980.

(Signed)

William D. Dupree
West Texas Legal Services
100 Main Street,
LAWYERS' BUILDING
Fort Worth, Texas 76102
(817) 336-3943
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I, William D. Dupree, a member of the Bar of the Supreme Court of the United States and Counsel of Record for Kay Boggs Morris, hereby certify that on the 30 day of July, 1980, pursuant to Rule 33, Rules of the Supreme Court, served three copies of the foregoing Notice of Appeal to the Supreme Court of the United States to the Eastland Court of Civil Appeals, and the Texas Supreme Court, as well as each of the parties herein, as follows:

(1) Honorable Mark White
Attorney General
State Capitol
Austin, Texas 78711

(2) Ms. Sharon Johnson
Assistant District Attorney
Taylor County Courthouse
Abilene, Texas

by depositing said copies in the United States Mail, Fort Worth, Texas, with first class postage, prepaid, properly addressed to the post office address of the said Sharon Johnson, Assistant District Attorney, and the said Honorable Mark White, State Attorney General.

All parties required to be served have been served.

DATED this 30 day of July, 1980.

(Signed)

William D. Dupree

APPENDIX G

Texas Family Code, Section 15.02

§15.02. Involuntary Termination of Parental Rights

A petition requesting termination of the parent-child relationship with respect to a parent who is not the petitioner may be granted if the court finds that:

(1) the parent has:

(A) voluntarily left the child alone or in the possession of another not the parent and expressed an intent not to return; or

(B) voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the child, and remained away for a period of at least three months; or

(C) voluntarily left the child alone or in the possession of another not the parent and, although expressing an intent to return, failed to do so without providing adequate support of the child and remained away for a period of at least six months; or

(D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endangered the physical or emotional well-being of the child; or

(E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child; or

(F) failed to support the child in accordance with his ability during a period of one year ending within six months of the date of the filing of the petition; or

(G) abandoned the child without identifying the child or furnishing means of identification, and the child's identity cannot be ascertained by the exercise of reasonable diligence; or

(H) voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, and remained apart from the child or failed to support the child since birth; or

(I) contumaciously refused to submit to a reasonable and lawful order of a court under Section 34.05 of this code; or

(J) been the major cause of:

(i) the failure of the child to be enrolled in school as required by the Texas Education Code; or

(ii) the child's absence from his home without the consent of his parents or guardian for a substantial length of time or without the intent to return; or

(K) executed before or after the suit is filed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided by Section 15.03 of this code; and in addition, the court further finds that

(2) termination is in the best interest of the child.

80-537

Supreme Court, U. S.
FILED
OCT 16 1980
MICHAEL RODAK, JR., CLERK

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

IN RE: J.W.B., J.G.B., AND K.L.B.

ON APPEAL FROM THE
SUPREME COURT OF TEXAS

MOTION TO DISMISS OR AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO.

IN RE: J.W.B., J.G.B., AND K.L.B.

MOTION TO DISMISS OR AFFIRM

Appellee, the Taylor County Child Welfare Unit, moves the Court to dismiss the appeal filed herein, or in the alternative, to affirm the judgment of the Supreme Court of Texas, on the following grounds:

1. The questions on which decision of this cause depends are so insubstantial as to need no further argument.

2. Appellant's second question on appeal is not within the jurisdiction of the Court under

the provisions of 28 U.S.C. §1257(2).

3. Appellant failed to raise certain portions of his second ground for appeal in the State courts.

4. Appellant has no standing to challenge the competence of the children's attorney ad litem.

Appellant has requested that her Jurisdictional Statement be considered a petition for writ of certiorari on those grounds which are not appealable under 28 U.S.C. §1257(2). If Appellant's Jurisdictional Statement is so considered, Appellee requests the Court to consider this Motion a brief in opposition to Appellant's petition.

STATUTE INVOLVED

This appeal questions the validity of portions of Section 15.02 of the Texas Family Code. The statute governs termination of the parent-child relationship in the State of Texas.

Section 15.02(1) sets forth eleven specific grounds which may be the basis of a suit

to terminate the parent-child relationship. The trial court must find that at least one of these grounds exists in order to grant a petition requesting termination.

In the case at bar, termination was based on subsections (B), (D) and (E) of Section 15.02(1), which read as follows:

> 15.02(1) the parent has
> (B) voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the child, and remained away for a period of at least three months;
> (D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child;
> (E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child.

In addition to finding the existence of one or more of the grounds set forth in Section

15.02(1), the Texas statute requires the trial court to make an affirmative finding under Section 15.02(2), which reads as follows:

> 15.02(2) termination is in the best interest of the child.

NATURE OF THE CASE

In February of 1978, the Taylor County Child Welfare Unit, Appellee herein, filed a Petition to Terminate the Parent-Child Relationship between Appellant and her minor children. Following a jury trial in October and November, 1978, the trial court entered a decree terminating Appellant's parental rights and appointing the Taylor County Child Welfare Unit managing conservator of the children.

The judgment of the trial court was affirmed by the Court of Civil Appeals, 11th Supreme Judicial District, at Eastland, Texas, on the 18th of October, 1979. The Supreme Court of Texas refused Appellant's Application for Writ of Error on May 14, 1980. Appellant's Motion for Rehearing

was overruled on July 23, 1980.

Appellant then appealed to the Supreme Court of the United States pursuant to Title 28 U.S.C., Section 1257(2), maintaining that portions of Section 15.02 of the Texas Family Code are unconstitutionally vague and overbroad, and that Appellant was denied due process and subjected to double jeopardy at her trial.

ARGUMENT

1. THE APPEAL PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

The first question on appeal, i.e. the constitutionality of Section 15.02(1)(D) and (E) and 15.02(2) of the Texas Family Code, is so wanting in substance as to require no further argument to the Court. See Wilheim v. Moffat Tunnel Improvement District, 262 U.S. 710, 716-17(1923): Ex parte Poresky, 290 U.S. 30,32(1933); and Cuyahoga River Power Co. v. Northern Ohio Traction & Light Co., 252 U.S.

388,397(1920).

A.
Section 15.02(2)

The major focus of Appellant's attack is the best interest standard set forth in Section 15.02(2). While Appellee agrees that standing alone and with no further interpretation this standard would be impermissibly vague and overbroad as the controlling standard in a suit to terminate parental rights, the best interest standard as used by the Texas courts functions is a protection for the parent against whom termination is sought.

Affirmative findings under both subsections of Section 15.02 are necessary to justify termination. Holley v. Adams, 544 S.W.2d 367, 370 (Tex. 1976); and Wiley v. Spratlin, 543 S.W. 2d 349, 351 (Tex. 1976). Section 15.02(1) sets forth specific behaviors which are sufficient grounds to justify termination. Section 15.02(2), containing the best interest standard, is an

additional protection designed to preserve the family unit in cases in which special circumstances mitigate or excuse the behaviors set forth in Section 15.02(1). It is not intended to proscribe specific conduct.

Further, a statute may be rescued from a finding of vagueness by state court decisions which set forth factors and criteria to be taken into account by the courts in making decisions under the statute. See Colten v. Kentucky, 407 U.S. 104 (1972). The best interest of the child standard has been elaborated upon by the Texas Supreme Court in the Holley case, supra, which lists nine factors the trial court should consider in determining the best interest of the child. The factors are:

(A) the desires of the child;
(B) the emotional and physical needs of the child now and in the future;
(C) the emotional and physical danger to the child now and in the future;
(D) the parental abilities of the individuals seeking custody;
(E) the programs available to assist these individuals to promote the

best interest of the child;
(F) the plans for the child by the individuals or by the agency seeking custody;
(G) the stability of the home or proposed placement;
(H) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and
(I) any excuse for the acts or omissions of the parent.

Holley v. Adams, supra at 372.

B.
Section 15.02(1)

Appellant also attacks Section 15.02(1)(B), (D), and (E) as being impermissibly vague and overbroad. A non-criminal statute is unconstitutionally vague under the due process clause of the Fifth or Fourteenth Amendments only when its language does not convey sufficiently definite warning as to the conduct proscribed, when measured by common understanding or practice. Arnett v. Kennedy, 416 U.S. 134, 158-64 (1974); and United States v. Cardiff, 344 U.S. 174, 176 (1952). Before it will be struck down, a statute must be so vague that men of common intelligence must

guess at its application. Giaccio v. Pennsylvania, 382 U.S. 399 (1966); and Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

A finding of vagueness will result only where "the exaction of obedience to a rule or standard...is so vague and indefinite as really to be no rule or standard at all..." A.B. Small Co. v. American Sugar Refining Co., 267 U.S. 233, 239 (1925). See also Broadick v. Oklahoma, 413 U.S. 601, 607-08 (1973); and Arnett v. Kennedy, supra at 159-60.

The sections of the termination statute at issue in this case provide fair warning of the type of conduct which will justify termination of parental rights. Section 15.02(1)(D) covers situations where the parent neglects a child by exposing him to conditions or surroundings which endanger the child either physically or emotionally, while Section 15.02(E) contemplates aggressive behavior toward the child which results in physical or emotional abuse.

Higgins v. Dallas County Child Welfare Unit, 544 S.W.2d 745, 749 (Tex. Civ. App.--Dallas 1976), no writ. It is true that the trier of fact must determine on a case by case basis whether the specific conduct or conditions involved endanger a child, but it would be impossible for the statute to set forth each act or surrounding which constitutes a danger to children. As previously stated by this Court, the vagueness doctrine "is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing...statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited." Colten v. Kentucky, 407 U.S. 104, 110 (1972).

2. APPELLANT'S SECOND QUESTION ON APPEAL IS NOT WITHIN THE JURISDICTION OF THE COURT.

Appellant's second ground for appeal is an assertion that she was deprived of due process

and subjected to double jeopardy in a quasi-criminal proceeding. Appellant has set forth 28 U.S.C. 1257(2) as the statute providing the Court with jurisdiction of this appeal. This statute gives the Court the right to review final judgments of the highest court of a State where a State statute is upheld against a challenge that such statute is repugnant to the Constitution, treaties or laws of the United States.

Appellant's second ground for appeal does not challenge a state statute, and thus is not within the Court's appellate jurisdiction.

3. APPELLANT FAILED TO RAISE CERTAIN PORTIONS OF HIS SECOND GROUND FOR APPEAL IN THE STATE COURTS.

Appellant's assertions that she was subjected to double jeopardy in a quasi-criminal proceeding and that the state had no compelling interest in terminating parental

rights in this case were made for the first time in the Jurisdictional Statement filed with this Court. This Court has consistently ruled that before its jurisdiction may be invoked on appeal from a state court, the Federal questions involved must be properly raised in the courts below. Hulbert v. Chicago, 202 U.S. 275 (1906); Brown v. Commonwealth of Massachusetts, 144 U.S. 573 (1892); and John v. Paullin, 231 U.S. 583 (1914).

In the State courts, Appellant did not challenge the finality of the decree entered in the first termination proceeding brought against her, nor did she challenge the procedures by which her children were removed from her. In the Texas appellate courts, Appellant relied on the doctrine of res judicata, claiming that some of the evidence introduced at her trial had been introduced in a previous termination case.

Texas courts have long recognized an

exception to the rule of res judicata in cases dealing with the parent-child relationship. This exception allows the admission of testimony concerning prior acts of misconduct where such acts are offered to corroborate similar acts in a proceeding subsequent to the original decree. Wilson v. Elliott, 96 Tex. 472,73 S.W. 946 (1903); Olds v. Burton, 181 S.W.2d 118 (Tex. Civ. App.--Eastland 1944, no writ); Pennington v. Pennington, 195 S.W.2d 677 (Tex. Civ. App.--Texarkana 1946, no writ); Otto v. Otto, 438 S.W. 2d 587 (Tex. Civ. App.--San Antonio 1969, no writ); and Ex Parte Gallop, 486 S.W.2d 836 (Tex. Civ. App.--Beaumont 1972, writ ref'd. n.r.e.).

The testimony objected to in the case at bar concerned Appellant's instability, her propensity to abandon her children when faced with stress, and her neglect of her children. This evidence was offered to corroborate Petitioner's conduct after regaining custody of her children at her first termination hearing, and to

establish a continuing pattern of behavior. Therefore, the evidence was not barred by the principle of res judicata.

As for Appellant's assertion that the State had no compelling interest to justify petitioning to terminate Appellant's parental rights, it cannot be argued that the State has both the right and the duty to protect children from neglect or abuse. See Prince v. Massachusetts, 321 U.S. 158 (1944); and Stanley v. Illinois, 405 U.S. 645 (1972). In this case, a child psychologist's expert testimony established that Appellant's children suffered emotional harm in the form of anxiety, a sense of threat and helplessness, and an inability to express or accept affection as a result of the instability the children experienced in their relationship with their mother. (S.F. 577-78, 580-81, 584, 585, 606, 793). Testimony established that Appellant had at least fifteen residences in less than

a three-year period (S.F. 293-4, 297-8, 303, 305, 311, 316, 421, 447, 454, 660); was separated from the man who was then her husband five times in a one-year period (S.F. 316); and had approximately ten jobs in a two and one-half year period (S.F.660). While the children were in her custody, Appellant left them with relatives whom they hardly knew (S.F. 437); left them with babysitters and failed to return for them (S.F. 235,291); and left them with the man who was then her husband for extended periods while she went to parties and bars and he had no knowledge of her whereabouts (S.F. 454, 456).

This pattern of behavior had continued over several years, and there was no evidence that it would change. The expert testimony directly linked Appellant's instability and the children's emotional problems.

4. APPELLANT LACKS STANDING TO CHALLENGE THE COMPETENCE OF THE CHILDREN'S ATTORNEY

AD LITEM.

A party may not appeal an issue which is not adverse to him, even though he was a party to the action in which that issue was decided. Milgram v. Loews, Inc., 192 F.2d 579 (1952), cert. den. 343 U.S. 929. Only the aggrieved party may appeal. United States v. Adamant Co., 197 F.2d 1 (1952), cert. den.; Bullen v. Scoville, 344 U.S. 903; and Queensboro Farms Products v. Wickard, 137 F.2d 969 (1943).

If the interests of the children have not been properly represented, they have the right to bring suit against their attorney through a proper representative, such as next friend. Texas Employers Ins. Ass'n. v. Grimes, 153 Tex. 357, 269 S.W.2d 332 (1954); and In re Dudley's Estate, 88 S.W.2d 616 (Tex. Civ. App.--San Antonio 1953, writ dism'd.). It is not proper for the parent, whose interests may be in opposition to the children, to appeal their representation.

Furthermore, although Appellant challenges the competence of the children's attorney, she points to no specific incidence of incompetence or neglect of his duty, nor does Appellant clearly set forth in what manner the attorney ad litem failed in his responsibility, other than the ad litem's failure to side with Appellant.

5. THERE IS NO MERIT TO APPELLANT'S CONTENTION THAT APPELLEE COMMITTED CUMULATIVE PROCEDURAL ERROR WHICH PREJUDICED THE JURY AGAINST APPELLANT.

Appellant maintains that Appellee's attorney made repeated efforts to admit inadmissible and inflammatory evidence, which forced Appellant's attorney to make repeated objections, thereby prejudicing the jury against him.

Appellant presents no evidence or support from the record that Appellee intentionally attempted to prejudice the jury by

interjecting improper testimony, nor does he show that the jury was, in fact, prejudiced by counsel's behavior.

Generally, the asking of improper questions is reversible error only if the conduct of counsel was improper, and was reasonably calculated to cause and probably did cause the rendition of an improper verdict. Tex. R. Civ. P. 434 and 503; Aultman v. Dallas R & T Co., 152 Tex. 509, 260 S.W.2d 596 (1953); and Condra Funeral Home v. Rollin, 158 Tex. 478, 314 S.W.2d 277 (1958). Cases requiring reversal are those in which evidence sought to be elicited would have been extremely prejudicial, and the questions asked by their very nature tend to inflame the jury, even if left unanswered. Scott v. McLennan, 306 S.W.2d 942 (Tex. Civ. App.--Waco 1957, writ ref'd. n.r.e.).

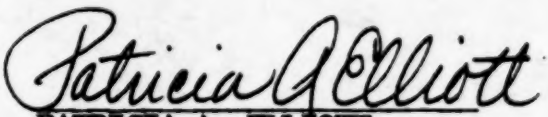
Appellee would point out that Appellant made sixty-four objections to the testimony of sixteen witnesses. On the average, fewer

than three objections per witness were upheld. Further, Appellee averaged approximately the same number of objections to each of Appellant's witnesses.

CONCLUSION

For the foregoing reasons, Appellee respectfully moves the Court to dismiss this appeal, or in the alternative to affirm the judgment of the Texas Supreme Court.

Respectfully submitted,



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